

SERVICE DATE - JULY 23, 2003

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. 41191

WEST TEXAS UTILITIES COMPANY

v.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY

Decided: July 22, 2003

This decision addresses the petition filed on May 14, 2003, by the complainant, West Texas Utilities Company (WTU),¹ seeking a procedural schedule for the submission of supplemental evidence, and the response filed by the defendant, The Burlington Northern and Santa Fe Railway Company (BNSF),² objecting to such a schedule. As discussed below, given intervening events, before the Board rules on that request, WTU should advise the Board on whether and how it wishes to proceed.

BACKGROUND

In 1996, in the West Texas I decision,³ the Board prescribed the maximum reasonable rate that BNSF may charge for transporting coal from the Rawhide mine in the Powder River Basin (PRB) of Wyoming to WTU's Oklaunion generating station in Vernon, TX. WTU subsequently asked the Board to extend the Rawhide prescription, over BNSF's objection, to other mine origins in the PRB. In 2000, in the West Texas II decision,⁴ the Board concluded that

¹ AEP Texas North Company is the successor in interest to WTU, the original complainant in this proceeding. For convenience, both the original complainant and its successor are herein referred to as WTU.

² The original defendant in this proceeding, Burlington Northern Railroad Company, has since merged with The Atchison, Topeka and Santa Fe Railway Company to form BNSF. For convenience, both the original defendant and its predecessor are herein referred to as BNSF.

³ West Texas Util. Co. v. Burlington N. R.R., 1 S.T.B. 638 (1996), aff'd sub nom. Burlington N. R.R. v. STB, 114 F.3d 206 (D.C. Cir. 1997).

⁴ West Texas Util. Co. v. Burlington N. R.R., Docket No. 41191 (STB served Nov. 7, (continued...))

it could not grant WTU's request absent "supplemental evidence tailored to those sites" (slip op. at 5).

In West Texas II Reconsideration, slip op. at 3, the Board called for three categories of supplemental evidence. First, it needed variable cost evidence, to make sure that extending the Rawhide prescription to the other mines would not result in prescribing rates below the jurisdictional floor. Second, the Board offered the parties an opportunity to address whether additional resources would be necessary for the stand-alone railroad to serve these additional mines, or whether the stand-alone cost (SAC) rate would be unaffected by including non-Rawhide mine origins in the SAC analysis. Finally, the Board offered both parties the opportunity to present evidence of "substantially changed circumstances" that would affect the rate analysis.

WTU did not file its petition seeking a procedural schedule for the submission of this supplemental evidence until 2003. WTU explains that the long delay in its request for a procedural schedule was due to an agreement with BNSF to defer consideration while they negotiated over a possible private resolution of their rate dispute.

BNSF opposes the May 2003 petition, objecting, *inter alia*, to altering the traffic group upon which the SAC analysis had been based. BNSF also states, however, that it is now willing to enter into a stipulation with WTU to extend the modified Rawhide prescription to the other PRB mine origins—the relief WTU sought in 2000—in light of the Board's recent decision in West Texas III.⁵ In that decision the rate prescription for the Rawhide movements was modified, at BNSF's request, to correct a legal error by the Board in West Texas I regarding the proper standard for rate relief.

DISCUSSION AND CONCLUSIONS

As a general proposition, if a carrier did not object to a shipper's request to extend a rate prescription to embrace nearby mines, the Board would likely grant a request for such relief. In this case, however, WTU may no longer desire that relief, given the intervening change in the Rawhide prescription. Accordingly, WTU should advise the Board on whether and how it wishes to proceed. Its petition for a procedural schedule will be held in abeyance pending such notification.

⁴(...continued)
2000), reconsideration denied (STB served Mar. 23, 2001) (West Texas II Reconsideration).

⁵ West Texas Util. Co. v. Burlington N. & S. F. Ry., Docket No. 41191 (STB served May 29, 2003), petition for reconsideration pending.

In West Texas II, the Board stated that WTU may submit evidence of “substantially changed circumstances.” This statement should not be construed as allowing a change in the fundamental assumptions upon which the original SAC analysis was based. The Board has recently held that it is not appropriate to bring an entirely new rate case under the guise of a reopening. Rather, a reopening for substantially changed circumstances is intended to address projections in the original decision that have proven to have been seriously inaccurate. See Arizona Pub. Serv. Co. v. Burlington N. & S. F. Ry., Docket No. 41185 et al. (STB served May 12, 2003), petition for reconsideration pending. If a shipper wishes to establish a current maximum reasonable rate using a SAC analysis that is based on different assumptions than originally used, its recourse is to have the rate prescription vacated, allow the railroad to establish a new common carrier rate, and then file a complaint challenging the railroad’s new rate. Id. at 5 n.7. This limitation is necessary to achieve a proper balance between the interests of fairness to all parties and of administrative finality and repose. See Arizona Pub. Serv. Co. v. Atchison, T. & S. F. Ry., 3 S.T.B. 70, 75 (1998).

WTU has expressed concern regarding the 2-year statute of limitations that would apply if it were to file a separate rate complaint for the non-Rawhide mines, because it first sought rate relief for these nearby mines several years ago, by seeking to have the West Texas I prescription expanded. It delayed pursuing that request apparently pursuant to an agreement with the carrier. Should WTU choose to file a separate rate complaint for the non-Rawhide mines, it is free to address whether, under these circumstances, the statute of limitations could be tolled.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. WTU’s request for a procedural schedule is held in abeyance.
2. WTU should advise the Board, within 30 days, how it wishes to proceed.
3. This decision is effective on July 23, 2003.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary